

DOCKET FILE COPY ORIGINAL

RECEIVED

MAY 18 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of

**TRINITY BROADCASTING OF
FLORIDA, INC.**

For Renewal of License of
Station WHFT(TV) (Channel 45),
Miami, Florida

GLENDAL E BROADCASTING COMPANY

For a Construction Permit for
a New TV Station on Channel 45
at Miami, Florida

AND

**TRINITY CHRISTIAN CENTER OF
SANTA ANA, INC.**

For Renewal of License of
Station WHSG(TV) (Channel 63),
Monroe, Georgia

GLENDAL E BROADCASTING COMPANY

For a Construction Permit for
a New TV Station on Channel 63
at Monroe, Georgia

) **MM DOCKET NO. 93-75**

)
)
) File No. BRCT-911001LY
)
)
)
)

) File No. BPCT-911227KE
)
)
)
)
)
)

) **MM DOCKET NO. 93-156**

)
) File No. BRCT-911129KR
)
)
)
)
)

) File No. BPCT-920228KE
)
)
)
)
)
)

No. of Copies rec'd
List ABCDE

0+14

AND

**TRINITY CHRISTIAN CENTER OF
SANTA ANA, INC.**

For Renewal of License of
Station KTBN-TV (Channel 40),
Santa Ana, California

MARAVILLAS BROADCASTING COMPANY

and

SIMON T

For a Construction Permit for
a New TV Station on Channel 40
at Santa Ana, California

AND

NATIONAL MINORITY T.V., INC.

For Renewal of License of
Station KNMT(TV) (Channel 24)
Portland, Oregon

MARAVILLAS BROADCASTING COMPANY

For a Construction Permit for
a New TV Station on Channel 24
at Portland, Oregon

)
)
)
) File No. BRCT-930730KF
)
)
)
)
) File No. BPCT-931028KS
)
)
)
) File No. BPCT-931101KF
)
)
)
)
)
)
)
) File No. BRCT-931004KI
)
)
)
)
)
)
) File No. BPCT-931230KF
)
)
)
)
)
)

Trinity Broadcasting of Texas, Inc. (again, collectively, "Trinity") and the League of United Latin American Citizens ("LULAC") filed a joint request for approval of settlement agreement (the "Trinity/LULAC agreement"). Finally, also on April 13, 1998, Trinity, NMTV and the California State Conference of Branches of the NAACP and the Alaska/Oregon/Washington State Conference of Branches of the NAACP filed a joint request for approval of settlement agreement (the "Trinity/NAACP agreement"). The Mass Media Bureau ("Bureau") hereby files consolidated comments.

2. The four agreements look toward the resolution of almost all of the various pending challenges to Trinity's and NMTV's qualifications to hold the captioned authorizations and to receive Commission grant of the captioned applications.¹ Thus, if the joint requests are granted, the Commission would: dismiss the various captioned applications (except for the application of Simon T) which are mutually exclusive with those of Trinity and NMTV; dismiss the various petitions to deny and related pleadings filed by SALAD, LULAC and the NAACP; and grant the captioned applications of Trinity and NMTV, except the renewal application for KTBN-TV. Essentially, the four agreements have as a condition precedent that the Commission resolve in Trinity's favor pending exceptions to the Initial Decision in the Miami proceeding. *Trinity Broadcasting of Florida, Inc.*, 10 FCC Rcd 12020

¹ None of the settlements referenced herein involves the pending application of Simon T, which is one of two applications that are mutually exclusive with the KTBN-TV renewal application. In this regard, it is noted in the joint request related to the Trinity/Glendale agreement (at n. 2) that Trinity has filed a petition to dismiss the Simon T application and that none of the settlement agreements is conditioned on the disposition of that motion. In the meantime, however, the Bureau has been informed that Trinity has also reached a settlement with Simon T.

(ALJ 1995) ("*ID*"). Because the Bureau continues to believe that Trinity is not qualified to retain its Miami authorization for the reasons set forth in detail in our post-*ID* filings, the Bureau objects to the joint requests insofar as they seek grant of Trinity's license renewal application for WHFT(TV). In the event, however, that the Commission resolves the basic qualifications question in Trinity's favor, the following analysis of the various settlement agreements is offered.

Trinity/Glendale agreement

3. In the Trinity/Glendale agreement, Trinity proposes to pay Glendale/Maravillas for all of their stock the sum of \$55 million in exchange for the dismissal of the Glendale and Maravillas applications which are mutually exclusive with those of Trinity and NMTV. Section 73.3523 of the Commission's Rules sets forth rules governing the dismissal of applications in renewal proceedings. Specifically, Section 73.3523(c) provides that if a competing applicant seeks to dismiss its application after the Initial Decision stage of the hearing, it must certify, *inter alia*, that the amount to be paid does not exceed the challenger's legitimate and prudent expenses and an itemized accounting of the dismissing applicant's expenses for which it sought reimbursement. Section 73.3523(b) provides that if the competing applicant seeks to dismiss its application prior to the Initial Decision stage of the proceeding, it must certify, *inter alia*, that it has not received and will not receive any money in exchange for dismissing its application. Of the competing applications filed by Glendale and Maravillas, only Glendale's Miami application has progressed through the Initial Decision

stage.

4. In *EZ Communications, Inc.*, 12 FCC Rcd 3307 (1997) ("*EZ*"), the Commission addressed a settlement which proposed to pay a dismissing applicant an amount which exceeded that applicant's expenses. The Commission noted that the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, eliminated the right of challengers to file applications for new facilities against an incumbent licensee's renewal application filed after May 1, 1995. Considering that the timing of the application filed by the *EZ* challenger, which was after adoption of the rule restricting payments to challengers, and the statutory change in the broadcast renewal process, the Commission concluded that the limitation on the amount to be paid to such a competing applicant in order to deter non-bona fide filings no longer served any public interest purpose. *EZ*, 12 FCC Rcd at 3308. The Commission also stated that: "[o]ther requests involving similar comparative renewal proceedings will be considered under this precedent." *Id.*

5. If Trinity is found qualified to remain a licensee, the rationale of *EZ* pertains to the instant proceeding. As was the case with the *EZ* challenger, there is no reason to believe that Glendale and Maravillas filed their applications with expectation of monetary gain since those filings occurred after the reimbursement limitations had been imposed. Further, as noted in *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, 12 FCC Rcd 22363 (1997) at ¶¶ 101-03, the Commission is seeking comment on how to resolve the few

remaining comparative/renewal proceedings. Since it may be quite some time before all of the proceedings concerning Trinity and NMTV can attain finality, the public interest would be better served by waiving rules that would prohibit otherwise acceptable settlements.

Accordingly, in the event Trinity is found qualified to receive renewal of its Miami license, the Bureau submits that the amount of the payments to Glendale and Maravillas should not bar grant of the joint request.

6. Except as noted above, the Trinity/Glendale settlement agreement appears to comply with Section 311 of the Communications Act and Section 73.3523 of the Commission's Rules. The applicants have affirmed that their agreement is the only agreement related to the settlement, and Glendale and Maravillas have affirmed that their applications were not filed for an improper purpose. The applicants have also demonstrated that, if Trinity is found qualified to remain a licensee, approval of the joint request will serve the public interest by terminating and/or simplifying these proceedings.

Trinity/SALAD, Trinity/LULAC and Trinity/NAACP agreements

7. In the Trinity/SALAD agreement, Trinity proposes to reimburse SALAD up to \$143,500 for legal expenses incurred in prosecuting its petition to deny the WHFT(TV), renewal application. In exchange, SALAD would forbear from further prosecution of its petition. Trinity also proposes to endow two new nonprofit entities the sum of \$50,000 each for the purpose of funding merit-based scholarships for students attending an institution of

higher learning in the State of Florida. In the Trinity/LULAC agreement, Trinity proposes to reimburse LULAC up to \$57,000 for legal expenses incurred in prosecuting its petitions to deny the KTVB-TV and KDTX-TV renewal applications as well as petitions to deny and related pleadings involving the now dismissed applications for the assignment of license for K20DM, Amarillo, Texas and the assignment of the construction permit for WWSR-TV, Mayville, Wisconsin. In exchange, LULAC would forbear from further prosecution of its petitions. In addition, Trinity and NMTV propose to provide \$1,800,000 to endow a series of grants to nonprofit organizations "to promote the increased participation of people of color . . . through opportunities to share in ownership, control, management and contracting in the media and other businesses and industries, and to participate as administrators, teachers and students in public and private education." The agreement further provides that if "prior FCC approval of specific grants is required," such approval will be obtained. The final agreement, the Trinity/NAACP agreement, proposes that Trinity and NMTV reimburse the NAACP up to \$11,500 for legal expenses incurred in the prosecution of petitions to deny the KTVB-TV and KNMT(TV) license renewal applications. In exchange, the NAACP would forbear from further prosecution of its petitions. In addition, Trinity and NMTV would provide \$50,000 to endow a new nonprofit entity for the purpose of funding merit-based scholarships for students attending a California or Oregon institution of higher learning, which has a program in broadcasting or mass communications.

8. Section 73.3588 of the Commission's Rules sets forth rules governing the dismissal of petitions to deny. Specifically, Section 73.3588(a) provides, *inter alia*, that the petitioner

must affirm that it will not receive consideration for withdrawal of the petition in excess of the petitioner's legitimate and prudent expenses. Further, the petitioner must provide an itemized accounting for the expenses for which it seeks reimbursement. Finally, the other parties to the agreement must certify that they had paid no more than the petitioner's legitimate and prudent expenses in exchange for the withdrawal of the petition to deny. Section 73.3588(b) provides, *inter alia*, that with respect to any agreement arising out of the withdrawal of a petition to deny which results in non-financial consideration such as employment initiatives, the parties must affirm that neither the petitioner nor any related person or organization will be involved in carrying out, for a fee, any employment or other non-financial initiative referred to in the agreement. If the petitioner or a person related to the petitioner will be receiving a benefit, there is a rebuttable presumption that the arrangement is contrary to the public interest. *Amendment of Sections 1.420 and 73.3584*, 5 FCC Rcd 3911, 3913 (1990) ("*Amendment*"). The presumption may be rebutted on a case-by-case basis by clear and convincing evidence that the agreement does, in fact, comport with the public interest. *Id.*

9. As noted above, the only consideration promised to SALAD, LULAC and the NAACP is for reimbursement of those organizations legal expenses in prosecuting the various petitions to deny. Further, each organization has provided the requisite declarations under penalty of perjury, which establish that the amounts promised do not exceed that organization's legitimate and prudent expenses. Trinity and NMTV have also provided appropriate declarations. Hence, the amount of consideration to be paid directly to each

petitioner to deny is unobjectionable.

10. With respect to the proposals to fund scholarships, the governing provisions explicitly exclude as potential recipients the organization's officers and directors, SALAD, LULAC or the NAACP members who executed declarations submitted in the litigation against Trinity, and the organization's attorneys, as well as related persons such as their parents and children. *See, e.g.*, para. 1 of the Trinity/SALAD agreement. However, other organization members are not excluded. The scholarship funds are to be administered by identified individuals who are represented as independent trustees who are not officers or directors of the petitioners. The "equal opportunity grants" provision in the Trinity/LULAC agreement (para. 1 of the agreement) contains the same criteria as those used to determine scholarship eligibility. However, the fund is to be administered by a committee composed of senior members of LULAC's board of directors.

11. In *Viacom International, Inc.*, 12 FCC Rcd 8474 (MMB 1997) ("*Viacom*"), the Bureau confronted settlement provisions similar to those involving scholarships in the Trinity/SALAD and Trinity/NAACP agreements. In *Viacom*, the Bureau observed that the funds available for distribution were to be administered by an independent trustee, with no business or familial relationship to the petitioner, who in his sole discretion would select the recipients. The Bureau then noted that, although the settlement agreement did not disqualify members of the petitioning group from the trustee's consideration, the fully independent nature of the trustee and unrestricted scope of his choice in disbursing funds assuaged

concerns over the flow of indirect benefits to the petitioner. The Bureau concluded that the settlement provisions were consistent with the public interest. *Viacom*, 12 FCC Rcd at 8479.

12. In accord with *Viacom*, the Bureau believes that the scholarship fund provisions of the agreements are consistent with the public interest. The administration of the funds appears to be entirely independent of the petitioners and the potential recipients do not include any person (or immediate family member) directly involved with the litigation. Thus, although the possibility exists that an ordinary member (or related family member) of a petitioner could receive a scholarship, the Bureau is satisfied that the Trinity/SALAD and Trinity/NAACP agreements comport with the public interest. However, because the Trinity/LULAC "equal opportunity grants" fund will be administered by senior members of the petitioner, the Bureau is concerned that substantial sums could be made readily available to organization members, thereby resulting in the indirect receipt of consideration in excess of that organization's expenses. *See Amendment*, 5 FCC Rcd 3911, 3913. Such an agreement has not been previously approved by the Commission. Indeed, all prior approvals of settlement agreements which could have resulted in indirect benefits to members of a petitioning group have heavily relied upon the independence of the disbursing entity to avoid the possibility of abuse. *E.g.*, *Viacom*, 12 FCC Rcd at 8479. The Bureau's concern in this regard is not alleviated by the provision which calls for FCC approval of specific grants inasmuch as this agency should not become mired in the administration of such a fund. Accordingly, while the Bureau believes that the scholarship provisions are acceptable, the Bureau objects to the grant provision of the Trinity/LULAC agreement so long as that fund is

administered by LULAC members or any persons related thereto.

Additional matters

13. In addition to the foregoing, all four agreements contain a provision that, for a period of up to 10 years, prohibits the filing of certain documents related to Trinity and/or NMTV. Specifically, in the Trinity/Glendale agreement, Glendale/Maravillas and related entities would be barred from filing with the Commission any document opposing the grant of any application to which Trinity, NMTV or any subsidiary or affiliate thereof is a party. The Trinity/SALAD, Trinity/LULAC and Trinity/NAACP agreements provide that SALAD, LULAC or the NAACP, respectively, may not bring any litigation (except litigation related to an alleged default of the agreement) in any forum or file with the Commission any document opposing the grant of any application (except in cases of alleged racial discrimination and/or alien ownership) to which Trinity, NMTV and/or other various related entities are parties.

14. Case law suggests that the provision barring future filings against Trinity may be contrary to the public interest. In *Nirvana Radio Broadcasting Corporation*, 4 FCC Rcd 2778 (Rev. Bd. 1989) ("*Nirvana*"), the parties to a settlement agreement proposed that a dismissing applicant would not for a period of five years file any "complaint, petition to deny, informal objection, or other document of any nature or kind with the FCC that . . . objects to, or challenges the construction permit or licenses of the stations . . . or any other formal or informal application or request to the FCC filed by the stations." The Review Board

determined that such a clause prevented the dismissing parties from bringing to the Commission's attention any matter, however substantial, even when a *bona fide* belief existed that the stations were not being operated in the public interest. The Review Board thus concluded that the clause was detrimental to the public interest. *Nirvana*, 4 FCC Rcd at 2779. The full Commission did not review this decision, and, as far as the Bureau is aware, has never spoken on this issue. Since the provision in the Trinity/Glendale agreement, as well as the like-worded provisions in the other agreements, appear to be as objectionable as the one addressed by the Review Board, the Commission should determine whether paragraph 9 of the Trinity/Glendale agreement entitled "Forbearance of future filings against Trinity and NMTV" (and the similar provisions in the other agreements), should be reformed in accordance with the *Nirvana* decision. *But see Barnstead Broadcasting Corporation v. Offshore Broadcasting Corporation*, 77 RR 2d 76 (D.D.C. 1994), where the court issued a preliminary injunction requiring the withdrawal of an informal objection to an application pending before the FCC pursuant to an agreement which prohibited the filing of such an objection.

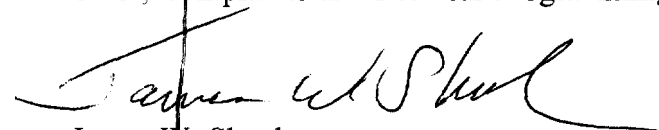
15. Accordingly, the Bureau opposes the joint requests because they are conditioned on the grant of Trinity's license renewal application for WHFT(TV), Miami, Florida. However, in the event that the Commission determines that Trinity is qualified to receive renewal of its license for WHFT(TV), the Commission should determine whether all of the agreements should be modified in accordance with *Nirvana*, as discussed in para. 14 above.

Further, the agreement involving LULAC should be modified in accordance with Section 73.3588 of the Commission's Rules, as discussed in para. 12 above.

Respectfully submitted,
Roy J. Stewart
Chief, Mass Media Bureau



Norman Goldstein
Chief, Complaints and Political Programming Branch



James W. Shook
Attorney
Mass Media Bureau

Federal Communications Commission
2025 M Street, N.W., Suite 8210
Washington, D.C. 20554
(202) 418-1430

May 18, 1998

CERTIFICATE OF SERVICE

I, CurTrisha Banks, a secretary in the Complaints and Political Programming Branch, Mass Media Bureau, certify that I have, on this 18th day of May, 1998, sent by regular United States mail, copies of the foregoing, "Mass Media Bureau's Consolidated Opposition to Joint Requests for Approval of Settlement Agreement" to:

Howard A. Topel, Esq.
Fleischman and Walsh, L.L.P.
1400 16th Street, N.W., Suite 600
Washington, D.C. 20036

Kathryn R. Schmeltzer, Esq.
Fisher, Wayland, Cooper, Leader & Zaragoza, L.L.P.
2001 Pennsylvania Avenue, N.W., Suite 400
Washington, D.C. 20006-1851

David E. Honig, Esq.
3636 16th Street, N.W., Suite B-366
Washington, D.C. 20010

Gene A. Bechtel, Esq.
Bechtel & Cole, Chartered
1901 L Street, N.W., Suite 250
Washington, D.C. 20036

Irving Gastfreund, Esq.
Kaye, Scholer, Fierman, Hays & Handler, LLP
901 15th Street, N.W., Suite 1100
Washington, D.C. 20005-2327


CurTrisha Banks